Nos. 88-805, 88-1125, 88-1309

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

STATE OF OHIO,
Appellant,
v.
AKRON CENTER FOR REPRODUCTIVE HEALTH, *et al.*,
Appellees.

On Appeal from the United States Court of Appeals for the Sixth Circuit

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JANE HODGSON, *et al.*,
Petitioners,
v.
STATE OF MINNESOTA, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF OF THE UNITED STATES CATHOLIC CONFERENCE AS *AMICUS CURIAE* IN SUPPORT OF THE STATES OF OHIO AND MINNESOTA

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INTEREST OF *AMICUS*

The United States Catholic Conference ("Conference") is a nonprofit corporation organized under the laws of the District of Columbia. Its members are the active Catholic

Bishops in the United States. The Conference advocates and promotes the pastoral teaching of the Bishops in such areas as education, family life, health and hospitals, social welfare, immigrant aid, poverty assistance, civic education, youth activities, and communications. When permitted by court rules and practice, the Conference files briefs as *amicus curiae* in litigation of importance to the Catholic Church and its people in the United States. Values of particular importance to the Church are the protection of family life and the protection of unborn life.[1] Both are implicated in the cases at bar.

Both Ohio and Minnesota request this Court to clarify the scope of a State's authority to legislate in the area of abortion when it concerns the rights and responsibilities of parents regarding their children. Because both States seek more definitive and detailed judicial direction of the content of their laws, this *amicus* is concerned that the Court will be tempted to grant those requests. Less not more specificity about the intricacies and facets of legislation is required from this Court. Unless plainly unconstitutional, a legislature's balance of the various rights, interests, and obligations in abortion, as in other areas of the law, should receive judicial deference, not redrafting. These cases offer the Court an opportunity to restore what *Roe v. Wade* and subsequent cases have denied: legitimate legislative prerogatives to set public policy in matters deeply affecting the welfare of parents and children.

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[1] Although such values may have religious or denominational roots, they are shared by many, including those who profess no religion. The suggestion that legislation restricting abortion "establishes" religion is spurious. *Harris v. McRae*, 448 U.S. 297 (1980). The mere fact that religious organizations advocate particular legislative approaches does not establish "religion" but only "free expression," a right we do not surrender by either self-restraint or enforced silence. *Compare Webster v. Reproductive Health Services*, 109 S.Ct. 3040, 3085 (1989) (Stevens, J., dissenting) *with* Bernardin, "The Role of the Religious Leader in the Development of Public Policy," 34 *DePaul L. Rev.* 1 (1984) (Address to ABA).

These cases also present an opportunity for this Court to resist efforts to portray parental notice laws as creating conflicts between rights of parents and rights of children, and in the process, to strengthen family integrity. This Court has historically affirmed and strengthened family life in many areas, but has not done so meaningfully in the context of abortion. If a family is to retain any vitality when confronted by this reality, its members must, at a minimum, be entitled to reflect upon and discuss whether a pregnant dependent adolescent should consider termination of her pregnancy through abortion. To rule that a State may not shield the family for a brief time for this kind of consultation is to deny family integrity and ultimately to undermine familial relationships.

Through their counsel, the parties have consented to the appearance of this *amicus*.

SUMMARY OF ARGUMENT

In its most recent Term, this Court upheld portions of a Missouri statute regulating abortion and establishing the State's policy regarding unborn life. *Webster v. Reproductive Health Services*, 109 S.Ct. 3040 (1989). A plurality recognized a conflict with existing decisions on abortion and expressed a willingness to narrow their scope or even overrule them if necessary. Certainly, as the plurality there recognized, the Court's jurisprudence has encouraged judicial involvement in the crafting of a "code of regulations rather than a body of constitutional doctrine." *Id.* at 3057. Its abortion decisions being essentially legislative, this Court until recently effectively reserved to the judiciary the task of writing the rules that would govern abortion regulation.

The States have continually expressed frustration over the constant and detailed involvement of the federal courts in the development of their statutory law. A particular area of concern has been the extent to which this Court has constitutionalized an adolescent's choice to have

an abortion, contrary to her parents' views or even without their knowledge. Starting with *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976), this Court has ruled in one fashion or another on the permissible parameters of that choice some eight times. Still, the ultimate issue of who must settle the scope of parents' involvement in their child's decisions persists. As the courts continue to prescribe the intricate details of the law, the legislatures—the traditional forum in which such issues are resolved—are stripped of their legitimate policy-making functions. In the process, the family unit suffers.

Society owes much of its stability to the strength of the family and has a vital interest in preserving family integrity. "The intangible fibers that connect parents and child . . . are woven throughout the fabric of our society, providing it with strength, beauty, and flexibility." *Lehr v. Robertson*, 463 U.S. 248, 256 (1983). Indeed, "the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition. It is through the family that we inculcate and pass down many of our most cherished values, moral and cultural." *Moore v. City of East Cleveland*, 431 U.S. 494, 503-504 (1977) (plurality).

Abortion challenges that institution and its values, as well as society itself, in fundamental ways. Under the abortion decisions of this Court, one member of a household may dictate to all the others whether new life—plainly a member of the family—may be allowed to be born. *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. at 70-71, 74-75. When the person making that decision is an adolescent, the implications are especially serious. If she is to appreciate meaningfully the import and consequences of her actions, the adolescent needs guidance from knowledgeable and caring persons, not abortion clinic employees who lack intimate information about her life. *Id.* at 91 (Stewart, J., concurring).

The persons she may and should look to are her parents or those who legally stand in their place. *Bellotti v. Baird (II)*, 443 U.S. 622, 640 (1979) (plurality).

This Court has recognized the importance of parental consultation and consent when the person seeking an abortion is an adolescent. *Planned Parenthood Ass'n v. Ashcroft*, 462 U.S. 476, 490-91, 505 (1983); *H.L. v. Matheson*, 450 U.S. 398, 409-11 (1981). The process of intra-family discussion and decisionmaking is advanced by statutes requiring that an adolescent pause for a brief time, facilitating consultation with her parents. It is well settled that such a legislative judgment, which reflects a proper balance of State, family and individual interests, should not be lightly set aside, and then only when it is "clearly incompatible" with supervening constitutional mandate. *Legal Tender Cases*, 79 U.S. (12 Wall.) 457, 530-31 (1870); *Otis v. Parker*, 187 U.S. 606, 608 (1903). The legitimacy of such a legislative judgment, presented in this case, cannot be seriously doubted. The normative principle that should guide this Court is its teaching that parents, even in families under stress, have a "vital interest in preventing the irretrievable destruction of their family life." *Santosky v. Kramer*, 455 U.S. 745, 753 (1982). That vital interest is properly advanced by the statutes under review here, and should be affirmed by this Court.

But more is needed. The underlying problem presented by these cases is the narrow role some would accord the legislature in the regulation of abortion. Opponents of parental notice demand that the trial courts entertain their opinion evidence that such laws are impractical and unwise, and for this reason, unconstitutional. Whatever merit these opinions might have, they are misdirected. Such argumentation, with corresponding rebuttal, would ordinarily be presented to the legislatures, not the courts, for debate and resolution. The increasingly intricate jurisprudence of this Court encourages, unfortunately, a

contrary result. A thorough reevaluation of *Roe v. Wade*, 410 U.S. 113 (1973), and the sixteen years of subsequent decisions, would lead to, at least, one singular result—restoration of the legislative function to the State legislatures. That kind of reconsideration should begin with these cases, where such issues are legitimately presented.

ARGUMENT

I

SIMPLIFYING THE INTRICATE RULES IN THIS COURT'S ABORTION JURISPRUDENCE EFFECTIVELY MEANS RECONSIDERATION OF *ROE v. WADE*.

Both Ohio and Minnesota sought review from this Court to clarify certain questions of statutory detail on the general issue of parental notice in instances of adolescent abortion. *E.g.*, Jurisdictional Statement of Ohio at 18-19; Cross-Petition for Writ of Certiorari of Minnesota at 16-17. Both lower courts endorsed the principle of parental involvement in the lives of their children. *Akron Center for Reproductive Health v. Slaby*, 854 F.2d 852, 857-58 (6th Cir. 1988); *Hodgson v. Minnesota*, 853 F.2d 1452, 1455 (8th Cir. 1988) (*en banc*). However, both courts questioned specific aspects of the statutes and in fact found fault in one or another detail of the statutes. *Akron Center*, 854 F.2d at 861; *Hodgson*, 853 F.2d at 1457. Minnesota notes that, in any other context, the principle advanced by the statute would be nondebatable: that parents should know about important aspects of their children's lives and be involved in their significant, life-affecting decisions. Cross-Petition at 15. Ohio goes further, noting that this case is a "paradigm of the inability of State legislatures to enact laws that effectuate the States' interest in encouraging parental involvement in the decision of a minor." Jurisdictional Statement at 16. Both States call for more definitive direction about the details of their statutes

from this Court. In other words, they seek an outline of a permissible statute.

These cases illustrate problems inherent in this Court's abortion jurisprudence. The Court has taken onto itself a broad rule-writing function, and created a code that has become even more ponderous and difficult, not only for the legislatures to interpret and apply, but also for courts to review. Until this Court is willing to face the issues legitimately presented by these cases [2] and reconsider the jurisprudence begun in *Roe v. Wade*, these problems will persist.[3]

A. The Abortion Decisions Reflect Increasingly Complex Legislative Activity by the Court.

In 1973, the Court created a new constitutional right to obtain an abortion with an accompanying "legislative"

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[2] Neither state has yet expressly sought reconsideration of *Roe v. Wade*. *But see* Ohio Jurisdictional Statement at 16-17. There is sentiment on the Court for avoiding such reconsideration unless the issue is actually presented *and* a proper party demands it. *Compare Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 452 (1983) (O'Connor, J., dissenting) (conflict but no demand) *with Webster v. Reproductive Health Services*, 109 S.Ct. 3040, 3060 (1989) (O'Connor, J., concurring) (demand but no conflict). In these cases, however, the scope and role of proper legislative activity is raised legitimately and should be resolved. *See id.* at 3058 (plurality). So too, the legislative balance given to competing interests, each of which this Court has called "fundamental" at one time or another, gives a legitimate basis on which to reconsider *Roe v. Wade*. *See* note 3, *infra*.

[3] Because the existence of a federal constitutional right to abortion is crucial to subject matter jurisdiction, the efficacy of *Roe v. Wade*, under which the federal question is presented, is always at issue in abortion cases, whether raised by a party or not. *See Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 541, 547 (1986). It is plain that unless the Court is willing to take action in an appropriate case, such as these, litigation will compound the Court's problems and the problems for those who must live or die with its decisions. Brief *Amicus Curiae* of U.S. Catholic Conference in *Webster v. Reproductive Health Services*, No. 88-605 at 4-6.

outline for how the right should be exercised.[4] *Roe v. Wade*, 410 U.S. at 156. In that case, however, this Court declined to rule that the newly discovered right was broad enough to encompass the decision of a minor to terminate her pregnancy. *Id.* at 165 n.67. In 1976, when the issue was presented, this Court concluded that a child had at least some protected privacy interest that precluded an absolute decision on her behalf by her parents, backed by the authority of the law. *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 74 (1976). Although this Court discussed the rights of minors to seek and obtain abortions without regard to the views of their parents, the Court's holding does not use language that reflects the adolescent in her precise status, namely, an unemancipated minor whose most fundamental relationship is not with her physician but with her parents.[5] Instead, it created a conflict between a "patient" (the adolescent) and a "third party" (her parents) and resolved the supposed struggle in favor of the "decision

[4] The Court essentially acts "legislatively" any time it announces rules or guides the subsequent action of the legislature. *Compare Berger v. New York*, 388 U.S. 41 (1967) *with* Omnibus Crime Control Act, Title III, 18 U.S.C. §§ 2510, *et seq.* Nonetheless, the Court's abortion jurisprudence goes much further than other examples of judicial direction of legislation. Whereas other illustrations draw distinctions or offer singular guidance, abortion cases are repetitious and divisive, and involve the courts in readjusting delicate balances, resolving matters of deep dispute, and redrafting the intricate details of statutes and regulations.

[5] Justice Stevens dissented, and implied that there was some broader role for the States to play in this jurisprudence. For example, in *Danforth* he would have voted to uphold the parental consent requirement as consistent with the holding in *Roe*. 428 U.S. at 102-103. On balance, Justice Stevens indicated that "a legislative determination that children should be entitled to the advice and moral support of parents is not irrational." Indeed, he pointed out the absence of focus by the majority on the status of the child and relationship with her parents, and the unseemly focus on the relationship with the physician as the "constitutionally permissible yardstick for determining whether a young woman can independently make an abortion decision." *Id.* at 105.

of the physician and his patient to terminate the patient's pregnancy, regardless of the reason for withholding [parental] consent." *Id.* (emphasis added).

By 1979, the Court took further legislative action in *Bellotti v. Baird (II)*, 443 U.S. 622 (1979),[6] when it not only held the Massachusetts consent law invalid but also specified the circumstances under which parental consent could be valid and included an outline for what has become known as a judicial bypass procedure. It should therefore not have been surprising that in *Planned Parenthood Association v. Ashcroft*, 462 U.S. 476, 490-91, 505 (1983), such a statute was upheld when it followed the recipe offered in *Bellotti II*. Although the present cases deal with parental notice rather than consent, the same kind of detailed judicial direction is common nonetheless.

In these many years of abortion litigation, in only one case has this Court ruled directly on parental notice.[7] In *H. L. v. Matheson*, 450 U.S. 398 (1981), the Court upheld a Utah parental notice statute but only after the majority narrowed the class represented by the plaintiffs to unemancipated dependent minors. It did not answer the question presented by the statute precisely, nor did

[6] In 1976 the Court in *Bellotti v. Baird (I)*, 428 U.S. 132 (1976), held open the prospect that the Court might defer to legislative judgment in particular cases by abstaining from passing on the particulars of the Massachusetts statute until the Massachusetts Supreme Judicial Court had construed that law. By abstaining, this Court reserved the right to decide in appropriate cases when consent could be required and under what circumstances, and decided *not* to strengthen the legislative role. *See Bellotti v. Baird (II)*, 443 U.S. 622, 656 n.4 (1979).

[7] In *Hartigan v. Zbaraz*, 484 U.S. 171 (1987), this Court divided evenly without opinion on the validity of a State statute that coupled parental notice with a waiting period. That order left standing a lower court determination that such a law was unconstitutional. 763 F.2d 1532 (7th Cir. 1985). Unfortunately, despite the narrow effect of the ruling, one of the courts below attempted to read some larger precedential principle into it. *Akron Center v. Slaby*, 854 F.2d at 861.

it answer the question posed by Justice Stevens in his concurring opinion. Justice Stevens pointed out that unlike parental consent laws, parental notice involved a much different calculus of competing values, most notably because it did not require a final parental decision. The principles he espoused in earlier cases (note 5, *supra*) "plainly dictate[d] that the Utah statute now before us be upheld." 450 U.S. at 421. Because the majority specifically narrowed the scope of its own decision, *H. L. v. Matheson* became the subject of speculation in the next series of abortion cases.

In *Akron v. Akron Center for Reproductive Health*, the majority asserted, but did not decide, that an "alternative procedure" is required under any law that would provide for parental involvement in their child's abortion decision. 462 U.S. 416, 428 n.10 (1983). Lower courts reading the Akron majority *dicta* believe they have divined both the mind of the Court favoring particular kinds of statutes as well as the specifics of the "legislative" relief that this Court would provide if the case were presented. *E.g., Glick v. McKay*, 616 F. Supp. 322, 324-25 (D. Nev. 1985).[8] This supposed need for an alternative procedure has invited the lower courts in these very cases to mandate the specifics of parental notice statutes. *Akron Center v. Slaby*, 854 F.2d at 860-61; *Hodgson v. Minnesota*, 853 F.2d at 1455-56. That this issue was not even presented in *H. L.*, as pointed out by Justice O'Connor in *Akron*, 462 U.S. at 469 n.12, was not discussed in those cases. Nor was it apparent that

[8] In the cases at bar, the Ohio litigation is truly a paradigm of the inability of the legislature to legislate. Juris. Stat. at 16. In that case, the court of appeals rejected the statute simply on the alleged inadequacy of various details in the bypass or "alternative" procedure. It is difficult to imagine how a court could act less like a court and more like a legislature in deciding how a statute *should* be constructed. The point is not how an "alternative" procedure is designed or even if one is "required." Rather, the decisionmaker and the designer should be the State legislature, not a federal court.

this kind of judicial role was inappropriate, or subject to any limits.

As the plurality in *Webster v. Reproductive Health Services* noted, the Court's abortion jurisprudence has indeed become "a web of legal rules that have become increasingly intricate, resembling a code of regulations rather than a body of constitutional doctrine." 109 S.Ct. at 3057. The solution to these cases does not lie in adding to the weave of the fabric but in untangling it. When courts usurp the legislative role, they frustrate not only the legislatures but themselves. *Id.* "The goal of constitutional adjudication is to hold true the balance between that which the Constitution puts beyond the reach of the democratic process and that which it does not." *Id.* at 3058. When the legislature balances competing interests to promote meaningful family consultation on issues that are deeply life-affecting, that legislative judgment is entitled to great respect and, unless plainly unconstitutional, should be sustained.

B. Judicial Review of State Health and Welfare Laws Should Exhibit Deference to the Legislative Process.

Chief Justice John Marshall once counseled that judging the unconstitutionality of State legislation was a task of "much delicacy, which ought seldom, if ever to be decided in the affirmative in a doubtful case." *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 128 (1810). *See Butler v. Pennsylvania*, 51 U.S. (10 How.) 402, 415 (1850). Legislation should not be voided "on slight implication and vague conjecture." *Fletcher v. Peck*, 10 U.S. (6 Cranch) at 128. Rather, in reviewing the conformance of a statute with the Constitution, a court must not so act unless and until it forms "a clear and strong conviction of their incompatability [sic] with each other." *Id.* The philosophy inherent in Chief Justice Marshall's admonition is judicial restraint—that courts reach constitutional issues only when strictly necessary. Among other

things, this philosophy serves "the consideration due to the judgment of other repositories of constitutional power concerning the scope of their authority." *Rescue Army v. Municipal Court*, 331 U.S. 549, 571 (1947).

The constitutional authority to resolve public debates over which actions shall be undertaken in the public interest is entrusted primarily to the legislative branch. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 420-21, 423 (1819). A legislature's role in matters affecting important health and safety interests is paramount, especially when it resolves matters of intense public controversy.[9] *See Webster v. Reproductive Health Services*, 109 S.Ct. at 3058; *Berman v. Parker*, 348 U.S. 26, 33 (1954); *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 794-96 (1986) (White, J., dissenting). It is not the province of a court to frustrate the legislative will because the law "may seem to the judges who pass upon it, excessive, unsuited to its ostensible end, or based on conceptions of morality with which they disagree." *Otis v. Parker*, 187 U.S. at 608; *see Baltimore Gas & Electric Company v. NRDC*, 462 U.S. 87, 97 (1983); B. Cardozo, *The Nature of the Judicial Proc-*

[9] In the juvenile death penalty cases, this point has been amply illustrated. In *Thompson v. Oklahoma*, 108 S.Ct. 2687, 2698-99 (1988), a plurality decided there were numerous State statutes expressing the view that minors did not have the experience, education, or maturity to evaluate the consequences of their conduct, citing, among other things, *Bellotti v. Baird*. *See id.* at 2709 (O'Connor, J., concurring). This rule of law was strengthened, not vitiated, by reconsideration of the juvenile death penalty cases in the last Term. *Stanford v. Kentucky* stands for the proposition that the jury system is best suited to determine individual responsibility *in the absence of some considered legislative judgment* evaluating the entire class of juveniles. 109 S.Ct. 2969, 2975-76 (1989). Thus the views expressed last Term reinforced the principle that legislative judgments on matters within their competence should ordinarily be upheld. Unfortunately, that has not always been the case when abortion statutes are involved. *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 814 (1986) (O'Connor, J., dissenting).

ess, 141 (1921). Rather, it is incumbent upon those attacking a statute to show that the law is "clearly incompatible" with the Constitution. *Legal Tender Cases*, 79 U.S. at 530-31. Although courts are and should be vigilant in the protection of fundamental rights (such as religious freedom), the means by which the courts act are essentially procedural, allocating burdens of proof and setting standards of certitude. Courts do not displace the legislative process entirely, especially where there is more than one claim to a fundamental interest.[10]

Because the intricate jurisprudence of this Court on abortion has departed from these normative principles, it continues to frustrate even a carefully exercised and balanced legislative will. The problem lies in the nature of the jurisprudence rather than in particular statutes that come before the Court. The law becomes more cumbersome to administer, and more difficult to predict with certainty by the States. *Thornburgh v. American College*, 476 U.S. at 814 (O'Connor, J., dissenting). The answer for the Court, not just for these cases, but for the many cases to come, lies in a thorough reconsideration of the line of cases that begins with *Roe v. Wade*. Such a reconsideration was demanded by the dissenters in *Thornburgh* and *Akron* and finally broached by a plurality in *Webster*. While there may be merit in the

[10] In abortion decisions, the calculation is never simply one of individual interests competing with interests of the State. The choices made in an abortion decision are complex and certainly affect the life interests of others: the unborn child, the father, other members of the family, and society itself. S. Jordan, *Decision Making for Incompetent Persons* 19 (1985). The decision implicates the procreative interests of both partners, can affect the sanctity of a marriage relationship, ends a life, and has other impacts on family relations, alienating children from their parents and separating those parents from their unborn grandchildren. It subjugates liberties that in other contexts are found to be fundamental, but in this context are found to be less worthy of protection. J. Noonan, *A Private Choice: Abortion in America in the Seventies* 90-95, 190 (1979).

suggestion that such reconsideration should allow "time enough . . . to do so carefully," *Webster*, 109 S.Ct. at 3061 (O'Connor, J., concurring), the problem grows more urgent with each case. For this Court the time has come to decide whether to continue to write rules or to allow legislatures to legislate. *Akron*, 462 U.S. at 456 (O'Connor, J., dissenting).

II

A STATE MAY PERMISSIBLY REQUIRE NOTICE TO PARENTS OF THEIR MINOR DAUGHTER'S INTENTION TO SEEK AN ABORTION AND A REASONABLE CHANCE FOR THEM TO CONFER WITH HER PRIOR TO EXECUTION OF HER DECISION TO ABORT HER CHILD.

Both States present a plain, and plainly valid, argument to this Court through their respective parental notice laws: parents should know about and be involved in life-affecting decisions made by their children. Such a proposition would appear to be beyond dispute. However, those who oppose parental notice in these cases suggest that these legislative efforts neither aid families nor promote legitimate exercise of rights, to the extent that parents may act to deny their adolescent daughters unfettered access to abortion. By framing the debate in these cases as a conflict between parents' rights and children's rights, those opponents have missed the most important point. This Court has cautioned against "intrusion by a State into family decisions," *Wisconsin v. Yoder* 406 U.S. 205, 231 (1972), delineating instead a "private realm of the family which the State cannot enter." *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944). As with other significant subjects that might come up from time to time within a family, the family must be given the opportunity to consider and resolve for itself matters relating to abortion.

A. Protection of Family Integrity Is an Important Public Welfare Interest that Merits Legislative Protection.

The mutual support and interdependence of family members have been strongly endorsed and protected in American law. "The intangible fibers that connect parent and child have infinite variety. They are woven throughout the fabric of our society, providing it with strength, beauty, and flexibility. It is self-evident that they are sufficiently vital to merit constitutional protection in appropriate cases." *Lehr v. Robertson*, 463 U.S. at 256. Protection of the family is a principle of life and law "deeply rooted in this Nation's history and tradition." *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977).[11]

Drawing on this rich historical tradition, this Court found the "natural duty of parents" to educate their children to be part of the fourteenth amendment liberty interest in marriage, establishing a home, and raising children. *Meyer v. Nebraska*, 262 U.S. 390, 399, 400 (1923). Parental nurture and direction of children is more than a "right" but a "high duty." *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925).[12] In *Prince v. Massachusetts*, this Court stated:

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[11] At common law in England and in the United States, the duties of parents to maintain, support, and educate their children were well-established. I W. Blackstone, *Commentaries on the Laws of England*, Ch. 16, 435, 440-41 (1765); II J. Kent, *Commentaries on American Law*, 160 (Da Capo ed. 1971). The duties of children relative to their parents were also well-established. *Id.* The common law family relationship may be described as mutual and reciprocal. I Blackstone at 440-41; II Kent at 170-73. Each member was bonded to the other in what one court called a "mutual interest in interdependence." *Duchesne v. Sugarman*, 566 F.2d 817, 825 (2d Cir. 1977). *See* Hafen, "Children's Liberation and the New Egalitarianism: Some Reservations About Abandoning Youth to their *'Rights,'*" 1976 *B.Y.U. L.Rev.* 604, 615-17, 651-52.

[12] The Court in *Wisconsin v. Yoder*, 406 U.S. 205, 213, 232 (1972) described *Pierce v. Society of Sisters* as a "charter of the

> It is cardinal with us that the custody, care and nurture of the child must reside first in the parents, whose primary function and freedom include preparation for obligations the State can neither supply nor hinder. And it is in recognition of this that these decisions [*Meyer* and *Pierce*] have respected the *private realm of the family which the State cannot enter.*

321 U.S. at 166 (emphasis added); *see Ginsburg v. New York*, 390 U.S. 629, 639 (1968).[13] The "primary role of the parents in the upbringing of their children is now established as an enduring American tradition." *Wisconsin v. Yoder*, 406 U.S. at 232.

Children, however, have rights as against certain kinds of parental actions and as against the State. Children cannot, at their parents' direction, be refused beneficial medical treatment or subjected to extensive work hours. *See Application of President and Directors of Georgetown College*, 331 F.2d 1000, 1007-1008 (D.C. Cir.), *cert. denied*, 377 U.S. 978 (1964); *Prince v. Massachusetts*, *supra*. Similarly, children cannot be denied rights to political expression or to an expectation of privacy in public schools. *Tinker v. Des Moines Independent School Dist.*, 393 U.S. 503, 506, 511 (1969); *New Jersey v. T.L.O.*, 469 U.S. 325, 334 (1985). Nor can children be

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rights of parents to direct the religious upbringing of their children." If anything, this should apply even more strongly to situations involving consideration of abortion where strong moral and religious convictions are implicated.

[13] In *Ginsburg v. New York*, the Court upheld a statutory ban on sale of non-obscene but adult-oriented magazines to all minors. 390 U.S. 629 (1968). The Court observed it "has consistently recognized that the parents' claim to authority in their own household is basic in the structure of our society [quotation from *Prince v. Massachusetts* omitted]. The legislature could properly conclude that parents . . . who have this primary responsibility for children's well-being are entitled to the support of laws designed to aid discharge of that responsibility." 390 U.S. at 639.

deprived of liberty without due process in public schools or in courts. *Goss v. Lopez*, 419 U.S. 565, 574, 575 (1975); *In Re Gault*, 387 U.S. 1, 13 (1967). The Court has not automatically either extended these rights to children, or granted them the full adult scope of the rights; both actions have been made dependent upon the nature of the countervailing State and parental interests. *E.g.*, *McKeiver v. Pennsylvania*, 403 U.S. 528, 545 (1971).

The resulting blend of "rights," "duties," and "obligations" is the family unit as it is now recognized in the law.[14] Although it has recognized children's "rights," the Court has affirmed the principle that parents play a "substantial, if not the dominant role" in their children's lives. *Parham v. J.R.*, 442 U.S. 584, 604 (1979); *see Wisconsin v. Yoder*, 406 U.S. at 244 (Douglas, J., dissenting). This role is displaced only where there is a serious threat to the child's health or safety or a "potential for significant social burdens." *Id.* at 233-34; *see Thornburgh*, 476 U.S. at 793 n.2 (White, J., dissenting). Even in families where relations between parents and children are strained, parents, because of their interest in preventing the "destruction of their family life," must have a chance to resolve their problems apart from State interference. *Santosky v. Kramer*, 455 U.S. 745, 753 (1982).[15]

In *Bellotti v. Baird (II)*, the plurality strongly endorsed the need for familial involvement in the lives of dependent children. 443 U.S. at 634, 640. Protection of family integrity may be advanced even in competition

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[14] Hafen, *supra* note 11 at 616-17 and authorities noted therein.

[15] This Court recently reaffirmed its long-standing deference to legislative judgments preserving the integrity of the marital family against asserted rights to establish paternity. *Michael H. v. Gerald D.*, 109 S.Ct. 2333, 2342, 2345 (1989).

with the separate interests of its members. "The unique role in our society of the family . . . requires that constitutional principles be applied with sensitivity and flexibility to the special needs of parents and children." *Id.* at 634. In particular, relying on *Ginsburg v. New York* and *Prince v. Massachusetts*, the plurality noted that "minors often lack the experience, perspective and judgment to recognize and avoid choices that could be detrimental to them." *Id.* at 635-36.

Although neither lower court in the cases on review disputed these principles,[16] the opponents of the legislation in effect urge this Court to abandon the time honored conclusion that the integrity of the family unit is itself a privacy interest deserving constitutional protection. *Lehr v. Robertson*, 463 U.S. at 258. For reasons developed below, in many cases such as the present, that interest is superior to and may limit the interest of a minor in unfettered access to abortion. More to the point, protection of the family is sufficiently important to justify appropriate limitations on a minor's access to abortion on her exclusive demand. "There is . . . an important State interest in encouraging a family rather than a judicial resolution of a minor's abortion decision." *Id.* at 648. This case presents an opportunity to reaffirm that principle.[17]

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[16] *Akron Center v. Slaby*, 854 F.2d at 857-58; *Hodgson v. Minnesota*, 853 F.2d at 1555.

[17] The Catholic Church's moral teaching on the role of and protection for the family reflects similar considerations. The Vatican Charter of the Rights of the Family (Oct. 22, 1983) provides that: "[p]ublic authorities must respect and foster the dignity, lawful independence, privacy, integrity and stability of every family (Article 6)." The Bishops of the United States have long recognized the need to stabilize and strengthen family life. U.S. Bishops, *Statement on the Christian Family* ¶¶ 8-10 (Nov. 21, 1949); USCC Administrative Board, *Political Responsibility: Choices for the 1980s* ¶¶ 42-43 (Oct. 26, 1979) (Rev. Ed. Mar. 22, 1984). They have likewise recognized that parents may not do that which is injurious to their children. U.S. Bishops' Committee for Pro-Life Activities and American Jewish Congress, *Joint Statement on Treatment of Handicapped Newborns* (1985).

B. The Court Should Reject Efforts to Redraft State Statutes that Promote the States' and the Family's Interests in Family Integrity.

Parental notice statutes are well within the permissible range of legislative action under this Court's family jurisprudence. Through these statutes, the States assure some private space for a family to discuss an adolescent's decision to seek an abortion. *Bellotti v. Baird (II)*, *supra*. It is as if the State has drawn a line around the family members to shield them for a brief moment to allow discussion of a decision that intimately affects the entire family relationship.[18] Both the parents' rights and their child's rights are implicated by abortion. *Akron v. Akron Center for Reproductive Health*, 462 U.S. at 428 n.10 (1983). The child's desire for her solution can strain against her parents' natural desire to provide guidance, direction, and support in making a responsible decision. In that time and private space, no one "right" is more important than the others. The integrity of the family is at stake. In devising such a statute, the legislature may decide that the family members normally act out of love, concern, and respect for each other. Evidence that a statute is not operating as designed, or that perhaps the legislature incorrectly balanced the various outlooks and perspectives, should not be presented to a court on judicial review, but rather should be presented to the legislature which has the constitutional authority in the first instance to make such a resolution. *Maher v. Roe*, 432

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[18] "The importance of the familial relationship, to the individual involved and to the society, stems from the emotional attachments that derive from the intimacy of daily association, and from the role it plays in 'promot[ing] a way of life' . . . ." *Smith v. Organization of Foster Families*, 431 U.S. 816, 844 (1977) (citing *Wisconsin v. Yoder*, 406 U.S. at 231-34).

U.S. 464, 479 (1977). In a doubtful case, in which there are various viewpoints in competition with each other in the legislature, that judgment itself may not be displaced because it is alleged to be unwise or impractical.

What the statutory opponents demand of this Court is that federal district courts become the means by which such legislative action is reconsidered and refined. They insist that, although legislatures may act on the basis of factual presumptions in enacting statutes, subsequent evidence that casts doubt on the wisdom or efficacy of a particular approach and its underlying presumptions is an adequate basis for any court to declare that statute unconstitutional. Hodgson Petition for Writ of Certiorari at 16-17, 21, 23.[19] As the *Hodgson* court noted, the opponents' record in the district court "raise[d] considerable questions about the practical wisdom of this statute. Nevertheless, we believe these are questions for the legislature." 853 F.2d at 1459. The opponents' renewed insistence that the lower courts should have relied only on the trial record that they created[20] appears to be nothing more than a guise to entice a court to substitute its judgment for that of a legislature. Redrafting the law should be the task of those who initially weighed the competing evidence and resolved conflicts in drafting the statute.

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[19] In that petition, the statutory opponents urge the Court to void not just Minnesota's two parent notice statute, but more broadly, "to revisit the question of the constitutionality of [notice] laws . . . on the factual record herein." Hodgson Petition at 17. Such an action would not only be inappropriate for lack of standing and other reasons, it shows the reach of the opponents' aims—to shut children off from parents.

[20] For example, the overwhelming majority of witnesses testified as part of the opponents' main case in *Hodgson v. Minnesota*, 648 F. Supp. 756, 774 (D. Minn. 1986). The district court nonetheless found that parental notice was effective. *E.g.*, Finding 58, *id.* at 766.

These are not cases in which the States blur the distinction between facial and operational challenges by urging a more rational and deferential judicial review. If a statute that is valid on its face nonetheless unduly burdens a constitutional right in practice, a court is free to consider that evidence and so rule without engaging in "legislative" activity. Here, only some of the argument or evidence goes to the application of either statute on review. The bulk of the opponents' case is directed at pushing this Court to redraw lines already set by the legislature, something a court may not do. *See, e.g., Kleppe v. New Mexico*, 426 U.S. 529, 541 n.10 (1976). These opponents, having lost in their legislatures, seek to enlist the courts in refighting their battles. Why these opponents could not just as readily reopen the legislative process goes unexplained. One searches the opponents' papers and the opinions below in vain for some reason excusing their abandonment of the legislative process.

One possible excuse implicit in the opponents' position lies in the fact that this Court continues to describe a woman's choice of abortion in constitutional terms. Although this *amicus* plainly disagrees, assuming *arguendo* the existence of a constitutional right, there is still no reason to second-guess legitimate choices designed to protect the family. First, the mere existence of a constitutional right does not empower the judiciary to assume a greater role. The first amendment interest advanced in *Ginsburg v. New York* is presumably no less fundamental. 390 U.S. at 636. Yet this Court flatly refused to sustain a child's interest as the dominant concern, siding instead with the legislature and the parents' obligations and interests. *Id.* at 639. Neither the absence of an opportunity to demonstrate "emancipation" or "maturity," nor the prospect of a parental veto was fatal. Likewise in the abortion context, at least a plurality has recognized that advancement of parental authority was not "inconsistent with our tradition of in-

dividual liberty . . . . Legal restrictions on minors, especially those supportive of the parental role, may be important to the child's chances for the full growth and maturity that make eventual participation in a free society meaningful and rewarding." *Bellotti v. Baird (II)*, 443 U.S. at 639. This implicit acknowledgment of the parents' fundamental rights offers more, not less, reason for deference to legislation that seeks to balance and resolve various concerns.

Second, the mere existence of a constitutional right does not guarantee the corresponding capacity to exercise it wisely. For this reason there are many restrictions on otherwise available and necessarily private choices for adolescents, without regard to "emancipation" or "maturity," including, *inter alia*, the privilege to drink, drive an automobile, marry, make purchases or enter into contracts. *Thompson v. Oklahoma*, 108 S.Ct. 2687, 2698-99 (1988); *see* note 9, *supra*. Yet opponents of parental notice accompanied by a waiting period for family discussion assert that such statutes "unduly burden" a minor's decision to obtain an abortion because parents might, on occasion, discourage the abortion that these opponents have decided is in the best interests of all minors.[21] This assertion involves two erroneous assumptions—that parents act contrary to their children's best interests and that abortion *is* in the best interests of the child.

As to the first assumption, our common law heritage from Blackstone and Kent to the most recent decisions of this Court (see note 11, *supra*) presumes that the

[21] For example, one of the principal pieces of evidence that the opponents have used against the Minnesota law is the statistic that the teenage birthrate has increased over the duration of the statute, while remaining more or less constant for the age group not covered by the statute. The implicit assumption is that those births would or should have been prevented by abortion. Hodgson Petition at 11 n.16. This is relevant only if there is a mandate to perform as many abortions as possible.

"natural bonds of affection lead parents to act in the best interests of their children." *Parham v. J.R.*, 442 U.S. at 602. Although "experience and reality may rebut what the law accepts as a starting point . . ., [s]imply because the decision of a parent is not agreeable to the child or because it involves risks does not automatically transfer the power to make that decision from the parents . . . ." *Id.* at 602, 603. This Court has repeatedly resisted the suggestion that it presume the worst. *H.L. v. Matheson*, 450 U.S. at 413; *Wisconsin v. Yoder*, 406 U.S. at 232. Where evidence exists as to specific concerns, it does not serve the public interest for this Court, on the basis of "expert" opinion in one trial court, to upset centuries of tradition.[22] Respecting parental rights and familial obligations, other decisions of this Court allow parents a "substantial, if not the dominant role" in making medical treatment decisions for their children. *Parham v. J.R.*, 442 U.S. at 604 (analyzing and rejecting *Danforth*). Because this Court has found that "children, even in adolescence, simply are not able to make sound judgments concerning . . . medical care or treatment," *Parham v. J.R.*, 442 U.S. at 603, it must not divest parents of meaningful input to their dependent child's abortion decision. What the Court recognized in *H.L. v. Matheson*, 450 U.S. at 412-13, about the grave consequences of abortion strengthens the need for effective and meaningful parental involvement.

As to the second assumption, *H.L. v. Matheson* authoritatively dismissed the assertion that abortion is in the child's best interest:

[22] If this is not the measure for constitutional adjudication, it would be just as reasonable for this Court to note the existence of contrary expert opinion supporting the need for parental consultation in these circumstances. Rue, "Abortion in Relationship Context," 9 *Int'l Rev. of Natural Family Planning* 95, 97-99 (1985). Crisis, argument, and discussion are inherent in family decision-making. Fear of the process does not justify judicially mandated avoidance by those who stand to benefit most.

> If the pregnant girl elects to carry her child to term, the *medical* decision to be made entails few—perhaps none—of the potentially grave emotional and psychological consequences of the decision to abort.

450 U.S. at 412-13; *see id.* at 411 and n.20 (describing unique medical, emotional and psychological complications associated with an adolescent's decision to have an abortion not present in adult cases). These considerations are particularly important in the abortion context:

> The abortion decision differs in important ways from other decisions that may be made during minority.
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> * * * *
>
> [C]onsidering her probable education, employment skills, financial resources, and emotional maturity, unwanted motherhood may be exceptionally burdensome for a minor. . . . [T]here are few situations in which denying a minor the right to make an important decision will have consequences so grave and indelible.
>
> Yet, an abortion may not be the best choice for a minor. In a given case, alternatives to abortion, such as marriage to the father of the child, arranging for its adoption, or assuming the responsibilities of motherhood with the assured support of family, may be feasible and relevant to the minor's best interest.

Bellotti v. Baird (II), 443 U.S. at 642-43.[23] G. Melton (ed.), *Adolescent Abortion: Psychological and Legal*

[23] The plurality endorsed Justice Stewart's view that the State may encourage a minor "to seek the help and advice of her parents in making the very important decision whether or not to bear a child." *Id.* at 641 (quoting *Planned Parenthood v. Danforth*, 428 U.S. at 91 (Stewart, J., concurring)). Justice Stewart tied his reliance on parental involvement to the fact that the adolescent "under emotional stress, may be ill-equipped to make [the decision] without mature advice and emotional support." *Planned Parenthood v. Danforth*, 428 U.S. at 91 (Stewart, J., concurring). Clinic personnel, with an economic interest at stake, would not likely offer such "counsel and support." *Id.* As the plurality expanded in *Bellotti v. Baird (II)*, 443 U.S. at 642 n.21: "Many minors who bypass their parents probably will resort to an abortion clinic, without being able to distinguish the competent and ethical from those that are incompetent and unethical." Parental "consulation and consent" are the "traditional way by which states have sought to protect children from their own immature and improvident decisions." *Planned Parenthood v. Danforth*, 428 U.S. at 95 (White, J., dissenting).

Issues 84 (1986). Those consequences are too grave to secure unrestricted exercise of the abortion decision for minors.

The effort to overturn the considered judgment of the legislatures, advancing meaningful family discussion over the *de minimis* "burden" imposed on the adolescent, must be firmly rejected. In *H.L. v. Matheson, supra*, this Court found that any inhibition of the decision to obtain an abortion based on actual or perceived parental action due to statutory notice was of *no* constitutional significance. Moreover, this Court has upheld consent statutes which present the possibility that parents may withhold consent and there may be *no* abortion. *Planned Parenthood Ass'n v. Ashcroft, supra.* Given these prior decisions, the statutes challenged here are plainly constitutional.

It is not the province of the courts to speculate about the quality of family relations and about the wisdom of particular legislation. *See Otis v. Parker*, 187 U.S. at 608. To do so is to exercise judicial review by, as John Marshall stated, "slight implication and vague conjecture." *Fletcher v. Peck, supra.* Unless the legislation is "clearly incompatible" with the Constitution, *Legal Tender Cases, supra*, it may not be set aside. Here, both Ohio and Minnesota were on firm constitutional ground in striving to balance important life interests. The opponents of these parental notice statutes seek to discourage parental involvement in their children's lives. Allowing them to succeed contravenes important constitu-

tionally protected interests, and sacrifices family integrity to the adolescent's perceptions of self-interest. There is simply no legitimate basis upon which to allow rejection of the statutes in question.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals for the Sixth Circuit should be reversed and the judgment of the Court of Appeals for the Eighth Circuit should be reversed in part and affirmed in part.

Respectfully submitted,

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